Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding To Identify and	)	**GN Docket No. 96-113**
Eliminate Market Entry Barriers for	)	
Small Businesses	)	

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

Submitted By:

Stephen R. Effros
James H. Ewalt

CABLE TELECOMMUNICATIONS
ASSOCIATION
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005
(703) 691-8875

August 23, 1996

TABLE OF CONTENTS

SUMMARY

Congress has mandated that the Commission identify and eliminate barriers to entry for small businesses. There are many. Some the Commission may be able to do something about. Others it will not. The most immediate impact the Commission can have, however, is on its own processes and practices that serve to erect barriers. The primary procedural barrier, is the way its rules are proposed and adopted.

The Cable Telecommunications Association ("CATA") suggests that the most effective and immediate action the Commission can take to eliminate barriers to entry for small businesses in the telecommunications marketplace is to reinstitute the practice of putting out for public comment in a Notice of Proposed Rulemaking, the actual proposed language, or variations thereof, of the rules it is considering adopting along with a clearly articulated statement of what those rules are intended to accomplish. This will enable small businesses to then focus on and comment on the specifics of the proposed rules, and allow the Commission in turn, to eliminate any unintended barriers.

CATA's suggested change in the Commission's rulemaking process not only will effectively eliminate entry barriers, but also, is required by law. The Small Business Regulatory Enforcement Fairness Act requires all federal agencies to do a detailed initial

and final analysis of the potential impact of their proposed rules on small business before the rules are adopted. CATA submits that the Commission cannot perform this analysis consistent with the law if it has not first stated what the rule is.

Implementation of CATA's suggested change in procedure will have a profound positive effect on at least limiting the barriers created to small business success in the telecommunications marketplace.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding To Identify and Eliminate Market Entry Barriers for Small Businesses	)	**GN Docket No. 96-113**

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION

I. INTRODUCTION

The Cable Telecommunications Association ("CATA") is a national trade association representing cable television owners and operators. CATA's membership includes both large and small operators and CATA has traditionally viewed and commented on Commission proceedings from the small system or operational point of view. This "Notice of Inquiry" to identify and eliminate market entry barriers for small businesses is of particular importance to CATA and its members. We have waited a long time for the Commission to focus on the issues raised herein, many of which we have brought to the Commission's attention over the past 20 years.

II. SCOPE: The Forest and the Trees

As the Commission notes, this is a very broad-based inquiry and one that is likely to spawn other inquiries and ultimately rulemakings in its wake. Certainly there is much the

Commission can do about reducing or eliminating barriers to entry in the telecommunications marketplace. CATA's comments herein primarily focus on a procedural issue very much in the control of the Commission, and which can be remedied without so much as one additional piece of paper being issued. It is primarily an issue of attitude and the concomitant actions that follow. It applies to all small businesses and, indeed, to all government agencies, not just the Federal Communications Commission ("FCC"). It is gender and race neutral.

It should be noted that the Commission's initial inquiry displays a strange balance, and one that could be of concern if it permeates the rest of this Congressionally - mandated action which is specifically designed,

> ...for the purpose of identifying and eliminating, by regulations pursuant to its authority under this Act, market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services....

Citing a single statement by a Congresswoman in the Congressional speeches accompanying the adoption of the Telecommunications Act of 1996, the Commission devotes almost one - third of this initial inquiry to the complicated issues surrounding minority and women-owned businesses. While those issues are indeed important, and certainly worthy of the Commission's consideration, as can be seen from the very thorny questions raised by the Commission in this inquiry surrounding special treatment for minority - and gender - based ownership preferences and the constitutional conundrum that creates, these are issues best left to a separate and distinct proceeding. Congress was finally clear in telling the

Commission that it should look very specifically at the actions it can take to eliminate any barriers to entry for small businesses. The Commission has many other opportunities to look at the various other issues it deems appropriate, such as whether minority ownership or businesses owned by women, whether those businesses are small or large, face unique or increased difficulty or barriers that can be addressed. But first, the Commission, by clear Congressional mandate, must look at the fundamental issue of market entry barriers for ALL small businesses.

If the Commission is successful at eliminating fundamental barriers to small business entry and success in the telecommunications marketplace, then those successes will flow to all parties. At that juncture it is appropriate to inquire further into special needs and special cases. But to initially focus on the special, unique, problems before dealing with the major, generally applicable ones, threatens to have the Commission not see the "forest" while focusing on individual "trees."

III. THE COMMISSION CAN TAKE IMMEDIATE, SUBSTANTIVE ACTION: Physician, Heal Thyself

The "forest" we refer to is the overall difficulty faced by small businesses in general and especially those attempting to compete in telecommunications, which has become increasingly consolidated and capital intensive. The principal difficulty that the Commission can address, however, is interestingly absent from its own list of questions in this proceeding regarding market entry. The familiar litany is recited. It would appear that the government

is asking questions which it already knows the answers to: Do small businesses have more trouble getting capital than large businesses? Of course. Are the terms and conditions for capital and credit less favorable for small businesses than large? Of course. Why ask these questions? The Commission has established the answers in numerous rulemakings across a variety of industries over an extended period of time. Part I of this Notice of Inquiry is a virtual bibliography of the Commission's own prior inquiries and conclusions that there are, of course, substantial impediments to small business success in the telecommunications marketplace.

The Commission has already, for instance, established special rules, albeit belatedly, for small cable systems because it conducted inquiries and studies that showed that cable rate regulations were having a severe, unintended impact on small cable operators precisely because of the truisms that it now apparently feels it must ask once again. CATA will simply point with accord to the comments of the Small Cable Business Association ("SCBA") in this proceeding which recount the Commission's own statistical findings back to it. The Commission already has the numbers. It has already reached conclusions, otherwise the "small cable" rules, among others, would not have been established.

Congress also knows that these impediments exist. Special funds would not have been set up by the government to assure the delivery of telephone, electricity, etc., to small, rural areas had they not. The Small Business Administration would not have been created.

Asking questions about whether "high deposit requirements" create a deterrent to entry are virtually answered by the very asking, and the government, particularly the FCC, knows it. The Commission already has record evidence in numerous proceedings. Small business representatives from CATA , SCBA and the Office of Small System Operators of the National Cable Television Association ("NCTA") have filed numerous comments, made many visits, and arranged endless discussions between Commission officials and small business entrepreneurs. We are sure that the same is true in all other industries regulated by the Commission. The question is not whether these underlying truisms exist, it is whether there are any aspects of the financing, operation or regulation of small business that can be changed to make those businesses more likely to succeed. This need not be yet another inquiry attempting to simply identify known impediments. The key is the Congressional mandate to ELIMINATE them.

In that context there is a notable omission in the Commission's litany of questions. The FCC never asks whether ITS OWN RULES and the way they are designed and implemented pose any undue barriers to small businesses! With the exception of one question relating to the granting of licenses in a 13-question laundry list of the difficulties everyone is aware are faced by small businesses, the Commission never asks the question of

whether there are any things IT is doing that could be changed to ease the inherent business inequalities faced by small business. From our point of view, it is far more likely that the Commission can have a positive impact on its own actions than it can on the inherent biases in the marketplace when it comes to small versus large businesses. Hence, it makes the most sense to look internally first, rather than externally. These comments and suggestions focus in that direction.

IV. HOW TO STOP MAKING "SAUSAGE" – OR, AT LEAST, HOW TO MAKE IT MORE PALATABLE TO SMALL BUSINESS

We are all familiar with the old saying that one should never look too closely at how either sausage or laws are made. This was not, however, supposed to be the case with administrative rules and regulations. While politics, lobbying, PAC funds, electioneering and the like are all understood to be a part of the law making process, the Administrative Procedure Act ("APA")(5 U.S.C. Sec. 551 et., seq.) and the Sunshine Rules (47 C.F.R. Sections 1.1202 et., seq.) were supposed to insulate the administrative rulemaking process from those vagaries. Unfortunately, it has not happened, and the group most often left out of the process is small business.

While in some ways the Sunshine Rules, which prohibit Commissioners from getting together informally to understand, analyze and iron out their differences, is inherently part of the underlying problem the Commission faces in improving its decisionmaking, we mention

it, but will not focus on it. The Commission, on its own motion, cannot change that law and the unintended consequences it has created.

The issues are far more starkly outlined, and the Commission itself can remedy its own actions when one looks at the actual process currently being used to design and adopt rules and regulations. Many of those rules and regulations, as can be seen from the other filings in this proceeding, serve as barriers to entry or continued success of small businesses in the telecommunications marketplace. This, in most cases, we believe, is unintentional. But nonetheless, it happens. And it happens on a consistent basis. Why? CATA hereby suggests that the reason is inextricably intertwined with the Commission's rulemaking process. A process it can change on its own at any time. Such a change, we believe, could have profound, positive effect on at least limiting the barriers created to small business success in the telecommunications marketplace.

V. THE WAY IT WAS -- THE WAY IT IS

The APA sets out a simple prescription for the way federal agencies are supposed to conduct proceedings leading up to the adoption of new rules and regulations. We note at the outset that we are not suggesting that the Commission has violated this law. This is not intended to be a legal treatise on the subject. Rather it is a set of observations from those representing small businesses as to how the reality of the rulemaking process as conducted by the FCC, creates real barriers to entry for small businesses, and how those processes can be changed to ameliorate those barriers.

The theory is a simple one: the APA says that first an agency should inquire as to the facts and need for any action surrounding a particular issue. Then, based on the record it accumulates in that "Notice of Inquiry," the Commission, if it still deems action necessary, should propose a SPECIFIC action with SPECIFIC regulatory language. That proposal, a "Notice of Proposed Rulemaking" ("NPRM") gives the affected parties time to look at the specific action being proposed and compare it both with the identified need and the anticipated result. Commenters, presumably those who will be most familiar with the effects of the proposal, can then give the Commission feedback, through their comments and reply comments, on the effectiveness of the Commission's prescription. Will it really do what the Commission intends? Is the language specific enough? Broad enough? Does it create unintended consequences? Is it too all-encompassing? Is a "shotgun" being used when a carefully aimed "bullet" would accomplish the goal? All of these are the questions that the design of the APA inherently asks in a NPRM.

Historically, the Commission followed the APA model. The actual language of a proposed rule was included in a NPRM, or alternatives were proposed on how the language could be drafted to gain the insight of commenting parties on which would be most appropriate for the articulated goal. Regrettably, this does not happen any more in many instances. The Commission, and we speak here from the perspective of cable television regulation although we understand that others regulated by the Commission have similar experiences, often foregoes the "Inquiry" process. Instead, broad, general "Rulemaking"

proceedings are initiated asking a myriad of questions and tackling broad subject areas. Following a round of defoliation where parties attempt to not only answer the questions asked but defend various positions surrounding the issue at debate, the Commission then endures a usually extended period of lobbying, repeated visits to Commissioners and staff, informal communication back and forth around various potential "solutions" to the perceived problem, press leaks, more hasty visits before the "window" falls on the comment period, and then, ultimately a rule is born. It is here that small business, and small business concerns, get lost in the process.

Many small business representatives, trade associations, etc., are also small. Our members rarely have the time or money to spend hours, days and weeks "walking the halls" of the FCC attempting to influence the final language of a given rule. This is especially true since the FCC is in an almost constant state of designing or redesigning rules, often by Congressional mandate and under Congressionally set deadlines. Larger companies and associations have the luxury of full-time staff or high-priced attorneys to inhabit the halls of the FCC on a nearly permanent basis to monitor and attempt to influence the often free-form debate that leads up to the actual drafting of rules. We do not criticize our larger brethren, we envy them. The result, however, is that most rules are written with great care regarding their impact on the large companies and on "consumer" interests, while the detailed effects on small business of the actual rule being adopted is often unknown.

Based on the Commission's current process, that new rule has never been seen, commented on, critiqued or vetted by many of those it will affect. The seeds of unintended consequences that could not be weeded out by a rational, public review of the actual proposed rule will inevitably grow. And just as inevitably, those least able to participate in this "witches brew" approach to writing rules will be the ones unintentionally injured. In too many cases small business bears the brunt of those unintended consequences.

When a massive "Rulemaking" is issued and the "brewing" begins, there are clearly identifiable participants in the "stirring" that follows. Certainly the largest companies, the AT&T's, the Regional Bell Operating Companies ("RBOC's"), the Time Warner's, and so on, participate. And that is as it should be. The "public interest" groups, too, are inevitably part of the mix. Indeed, the Commission has for many years said that its job is to assure that in any such proceeding it will represent the "public interest" and assure there is input from those groups. This was never more true than in the rules developed to regulate cable rates in 1993. It was often the case that selected self-styled "public interest" groups or "consumer" groups were given advance copies of proposed rules so they could informally comment on them, as were some members of Congress.

And while at least the Commission has sought SOME input from SOME parties on the actual language of rules before they are issued, simply "passing the language by" the RBOC's, or United States Telephone Association ("USTA"), or the NCTA or the Consumer Federation of America ("CFA") is not enough. The clear evidence of that is the vast

increase in the number of "Reconsiderations" the Commission has had to initiate as it found its initial rules inadequate or in some cases, downright damaging to the task it had set for them. Cable rate rules went through more than 13 iterations based on this process. The results were devastating for small cable businesses and the industry as a whole since it led to significant uncertainty and confusion as to the true status of the regulation of an entire industry segment. In that case the Commission was understandably constrained by artificial Congressional deadlines that did not allow for sufficient consideration of the actual rules before they were adopted. That, however, is not the case with most internally-generated rulemakings.

This is not to say that the Commission has not communicated or initiated "outreach" efforts to some of the representatives of "small business" -- CATA included. In the last year this "outreach" effort has been notable from our perspective. The Cable Services Bureau ("Bureau") has conscientiously worked to solicit information and opinions on a host of issues. But that does not solve the underlying problem. The Bureau, when it seeks that input, or the Commissioner's offices, when they discuss general issues, still cannot substitute for a thorough vetting of proposed regulatory language.

Similarly, USTA, CATA, NCTA, CFA, etc., cannot possibly be "all knowing" on the many issues relating to any given set of proposed rules. Neither can the Commission staff. The APA wisdom of seeking public comment on the specific language of proposed rules eliminates the need for such an unreasonable expectation. It allows all parties to comment

equally. It gives the Commission the opportunity to test language before it becomes law, not after. By doing so, far fewer "unintended consequences" are likely to occur and, therefore, far fewer law suits and appeals as well. CATA respectfully suggests that the simplest, most effective and immediate action the Commission can take to eliminate new barriers to entry for small businesses in the telecommunications marketplace would be to reinstitute the practice of putting out for public comment in a NPRM the actual proposed language, or variations thereof, of the rules the Commission is considering adopting along with a clearly articulated statement of what those rules are intended to accomplish. The ability of all parties, and particularly small business, to then focus on and comment on the specifics of a given rule will allow the Commission the luxury of pre-testing its new regulations before they are adopted, to "fine tune" the rules, to correct the potential errors, to sharpen the focus. And, by so doing, the Commission will automatically eliminate many of the unintended barriers that have been created in the past because this type of process was circumvented. It has worked in the past, and it can work again.

VI. NEWLY SIGNED LEGISLATION MANDATES A CHANGE IN THE COMMISSION'S WAYS

CATA's suggestion that the Commission change its customary rulemaking process to allow for greater input on the actual language and potential impact of proposed rules is now solidly supported by law. As was noted earlier, we did not suggest that the Commission was violating the technical language of the APA by not including specific proposed rule language in its rulemakings. However, we do believe that continuing to issue

non-specific, broad based inquiries characterized as rulemakings does violate the newly adopted Small Business Regulatory Enforcement Fairness Act ("SBREFA").

The SBREFA was signed into law on March 29, 1996, and amends the Regulatory Flexibility Act ("RFA"), that was enacted in 1980. A guide to the RFA prepared by the U.S. Small Business Administration Office of Advocacy is attached as "Appendix A". In short, SBREFA requires all agencies to do a detailed initial and final analysis of the potential impact of their proposed rules on small business before those rules are adopted. As we note in comments we filed in CS Docket No. 95-184, attached as "Appendix B", as an example, there is simply no way the Commission can possibly do such an analysis consistent with the law without first articulating what the actual rules are that are being analyzed! You cannot study ways to ameliorate the effects of a rule on small businesses consistent with the RFA if you have not first stated what the rule is. CATA has been repeatedly frustrated in attempts to bring this logic forcefully to the Commission's attention over a period of years because there was no enforcement power behind the RFA mandate. SBREFA changes that. Commission compliance with the RFA is now judicially reviewable. The Notice of Inquiry / Notice of Proposed Rulemaking process is going to have to change – and those changes, we believe, could have a profound, positive effect on eliminating barriers to entry for small business in the telecommunications marketplace.

VII. CONCLUSION

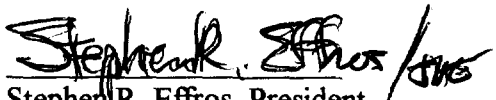
Congress has mandated that the Commission seek out and eliminate barriers to entry for small businesses. There are many. Some the Commission may be able to do something about, others they will not. It is unlikely, for instance, that the Commission will be able to change the bias in the money market against small business. Interest rates will be higher and money will continue to be harder to get for smaller versus larger businesses no matter what the FCC does.

The most immediate impact the Commission can have, however, is on its own processes and existing governmental rules and practices that serve to erect additional unnecessary barriers. The primary procedural barrier, as fully explored here, is the way rules are proposed and adopted. The Commission can and should change its customary truncated rulemaking process immediately. This is not only the right thing to do, and immediately effective in accomplishing the Congressional mandate, it is also required by the newly adopted Small Business Regulatory Enforcement Fairness Act.

There are many areas where the Commission can profitably investigate lessening the burdens on small business. With regard to cable television, CATA incorporates by reference the comments filed by NCTA in this proceeding for a more fully articulated listing of specific burdens within the industry that should be addressed. CATA's decision in these comments

to focus exclusively on the procedural rulemaking issue should emphasize to the Commission our belief in the importance and potentially fundamental change that could be effected in support of small business with the adoption of our recommendation.

Respectfully submitted,



Stephen R. Effros, President
James H. Ewalt, Executive Vice President

CABLE TELECOMMUNICATIONS
ASSOCIATION
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005
(703) 691-8875

August 23, 1996

APPENDIX A

A GUIDE TO THE REGULATORY FLEXIBILITY ACT

U. S. Small Business Administration

May 1996

A Guide to the Regulatory Flexibility Act

U.S. Small Business Administration
Washington, D.C.
May 1996

The purpose of this document is to provide an overview of the law for small entities. It is not intended, in itself, to create any substantive or procedural rights enforceable by law or in any administrative proceeding.

U.S. Small Business Administration,
Office of the Chief Counsel for Advocacy
409 Third Street S.W.
Washington, DC 20416
Tel. (202) 205-6533
http://www.sba.gov

Federal Recycling Program
Printed on recycled paper.

Table of Contents

Foreword

On March 29, 1996, President Clinton signed the Small Business Regulatory Enforcement Fairness Act. Among other things, the new law amends the Regulatory Flexibility Act of 1980 to allow judicial review of an agency's compliance with the law. This new provision gives small businesses a powerful tool to ensure that agencies are considering the impact of their actions on small entities.

The Regulatory Flexibility Act (RFA), first enacted in 1980, offers small businesses, working with federal regulators, a unique opportunity to root out some of the institutional biases that work against the small entrepreneur. The law recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a federal regulation.

For example, the costs of complying with a particular regulation—measured in staff time, direct compliance costs, recordkeeping, outside expertise and other costs—may be manageable for a business with 500 or more employees, or revenue in the millions of dollars. On the other hand, a smaller company may not have the ability to absorb the expenses as easily, to set competitive prices, to devise innovations or even to continue as a viable entity. Whereas larger firms may take advantage of economies of scale, smaller entities have less output from which to recover a relatively larger percentage of expenses.

The RFA was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. Major goals of the act are:

1) to increase agency awareness and understanding of the impact of their regulations on small business,

2) to require that agencies communicate and explain their findings to the public, and

3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

Until recently, no actions taken by an agency to comply with the RFA were directly challengeable in court. Without enforcement "teeth" to challenge an agency's certification that a regulation will not have a significant impact on a substantial number of small entities, several recalcitrant agencies do as little as necessary to comply with the act, and others use loopholes to escape the RFA's requirements altogether.

The 1996 amendments provide for judicial review under the RFA and for expanded authority of the chief counsel for advocacy to file *amicus* briefs in court proceedings involving an agency's violation of the RFA. This change in the law was supported by President Clinton and the Congress.

Easing the regulatory burden on small entities will require the ongoing help of government regulatory agencies and the interest, participation and ideas of small business men and women. The Clinton Administration's reinventing government initiatives to reduce paperwork, excessive penalties and unnecessary regulations will go a long way toward leading small businesses out of the regulatory jungle. The White House Conference on Small